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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, *Respondent.*

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Petitioners,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE and DEMOCRATIC NATIONAL COMMITTEE, *Respondents.*

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the Federal Communications Com-

mission in No. 71-864.[1] The decision of the Federal Communications Commission is reported at 25 F.C.C. 2d 216 (1970) and is reproduced in Appendix B to the petition filed by the Commission in No. 71-864.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions filed in these cases.

QUESTION PRESENTED

Whether the court below erred in ruling that an absolute ban on all paid announcements to discuss public issues imposed by broadcast licensees and endorsed by the Federal Communications Commission is inconsistent with the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and some of the pertinent provisions of the Communications Act of 1934 are set forth in the petitions filed in these cases. The following provisions of the Communications Act also bear upon the issues in these cases:

Section 307(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(a), provides:

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any

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[1] Appendix citations in this brief will be to the appendices attached to the petition filed by the government, which will be referred to as "FCC Pet."

applicant therefor a station license provided for by this chapter."

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

STATEMENT

The Democratic National Committee (DNC), a respondent in these cases, is the governing body of the National Democratic Party between conventions. On May 19, 1970, DNC filed with the Federal Communications Commission (Commission) a request for a declaratory ruling that broadcast licensees "may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues." FCC Pet., App. B, p. 48a. The Commission is authorized to issue such rulings pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and section 1.2 of its own regulations, 47 C.F.R. § 1.2.

At the time the request was filed, DNC was planning an extensive campaign on television and radio to raise money for the Democratic Party. The Party had in-

curred substantial debts during the 1968 presidential campaign, and funds were desperately needed to meet the demands of creditors. In addition, the 1970 off-year elections were on the political horizon, and money was needed to support the campaigns of Democratic candidates for national office. DNC realized from the outset that any effective campaign to solicit funds would have to be accompanied by statements of the Democratic Party's position on controversial issues of public importance and the Party's alternatives to the policies of the incumbent Republican Administration.

DNC selected the broadcast media for its planned campaign for two reasons. First, that forum—and particularly television—is the most powerful and most effective medium of communication ever devised by man. Second, access to the broadcast media would permit DNC to reach the greatest potential number of small contributors and thus reverse the disturbing tendency of political parties to rely on large contributions. DNC's initial inquiries, however, had indicated that the broadcast networks and individual licensees had widely varying policies concerning the sale of time for the purposes intended by DNC. For example, some broadcasters flatly refused to sell time for such purposes; others limited the sale of time for such purposes to election campaign periods. DNC sought the declaratory ruling before expending the thousands of dollars necessary to develop its media campaign.

With Commissioner Johnson dissenting, the Commission rejected the declaratory ruling sought by DNC. The Commission ruled, in effect, that broadcasters could, consistent with their obligations under the "public interest" standards of the Communications Act and

the First Amendment, refuse to sell any time to DNC or other responsible entities to discuss controversial issues of public importance.[2]

The Commission's endorsement of the broadcasters' flat ban on paid editorial advertisements [3] was grounded in what the court of appeals aptly described as "spectres of chaos, grossly unbalanced programming and financial disaster." FCC Pet., App. A, p. 42a. The Commission, for example, said that the rule sought by DNC would result in "a return to the chaotic situation of radio's early days," that "the public's agenda for discussion of public issues would . . . be set substantively and increasingly by the affluent," and that broadcasters would no longer be able to exercise their editorial judgment and journalistic control over "the manner in which the public is to be informed." FCC Pet., App. B, pp. 65a-66a. The Commission's opinion, however, is devoid of any attempt by the Commission to apply its administrative expertise to reconcile the conflicting interests it perceived.

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[2] The Commission did rule that it would be arbitrary for broadcasters to refuse to carry paid fund-raising solicitations by the major political parties or limit such solicitations to election periods. FCC Pet., App. B, pp. 72a-75a. However, the Commission's endorsement of the flat ban on editorial advertisements renders its ruling on fund-raising solicitations meaningless. To be effective, any fund-raising solicitation sponsored by DNC on the broadcast media would necessarily have to be accompanied by an expression of the Democratic Party's positions on controversial public issues. The Commission's approval of the flat ban on editorial advertisements presumably would permit a broadcaster to reject a fund-raising solicitation that also contained comment on public issues.

[3] The term "editorial advertisements" is used throughout this brief to describe paid announcements by responsible entities seeking to express their views on public issues.

The net result of the Commission's ruling is to permit the hawkers of detergents, mouth washes, beer, dog food and brassieres to maintain their present monopoly over that portion of the broadcast day that is reserved for paid announcements.

On the same day that the Commission denied DNC's request for a declaratory ruling, it also denied a complaint against a Washington, D.C., radio station filed by the Business Executives' Move for Vietnam Peace (BEM), an organization opposed to this country's Indochina policies. BEM's request to purchase time to present spot announcements expressing its opposition to the war in Indochina was rejected by the station and, relying essentially on its reasoning in its DNC ruling, the Commission sustained the station's action. FCC Pet., App. C. Both DNC and BEM sought review in the court of appeals.

The court of appeals, with one judge dissenting, reversed the Commission's endorsement of the flat ban on editorial advertisements. "We hold specifically that a flat ban on paid political announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." FCC Pet., App. A, p. 3a. The court was careful, however, to limit its ruling to the very narrow question it was deciding:

> "The actual issue before us is relatively narrow and we decide it narrowly. . . . [W]e leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an extreme form of control which totally excludes controversial public debate from broadcast advertising time. . . . We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant

> for air time—must necessarily be accepted by broadcast licensees. . . . [W]e confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." *Id.*

The court of appeals' decision was firmly grounded in this Court's seminal ruling in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969), which recognized the predominant First Amendment interest of the viewing and listening public in being fully informed by the broadcast media of conflicting viewpoints on controversial issues of public importance. The court below ruled that the rights defined by *Red Lion* necessarily included an interest in the mode and manner in which those viewpoints were presented. "It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way." FCC Pet., App. A, p. 22a.

The court found that editorial advertisements had a unique potential for furthering those First Amendment values. Unlike normal programming over which broadcasters exercise total control of format and content, editorial advertisements give to those who wish to speak on public issues an opportunity to exercise such control. For that reason, the court described editorial advertisements as "a special and separate mode of expression, not simply a duplication of other expression on the same medium." FCC Pet., App. A, p. 23a. In addition, the court noted that, "[i]n the First Amendment area, our best guarantee has always been a 'free market' in which partisans who feel strongly on partic-

ular issues may decide on their own to speak out and to speak out in their own way." FCC Pet., App. A, p. 24a.

The court responded to broadcaster objections that any requirement they accept editorial advertisements would deprive them of their traditional journalistic control over the presentation of public issues. The court noted that it was dealing only with that portion of the broadcast day—the portion reserved for paid announcements—"in which *editorial* control over content has never been of major importance." The court also stressed that "broadcasters would retain full latitude to control the content of their programming." FCC Pet., App. A, p. 38a.

The broadcasters and the Commission raised a variety of other objections to any scheme for editorial advertisements—objections that the court characterized as suggestions of an "administrative apocalypse"[4] and "spectres of chaos, grossly unbalanced programming and financial disaster."[5] The court discussed each of those objections, ruling that some did not override the First Amendment interests at stake and that others could be resolved by an exercise of the Commission's administrative expertise. The court noted that it was recognizing only an "abridgeable" right of access to the broadcast media for the presentation of editorial advertisements. FCC Pet., App. A, p. 22a. "It is well established in First Amendment law governing access to forums that 'reasonable regulations' may be promulgated and enforced to limit the exercise of free speech." FCC Pet., App. A, p. 39a. The regulations

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[4] FCC Pet., App. A, p. 40a.

[5] FCC Pet., App. A, p. 42a.

referred to by the court commonly govern the time, place and manner of such speech. By opposing such a limited and abridgeable right, the court viewed the Commission and broadcasters as proposing an extreme form of censorship by which "public issue advertising may be aired 'at no time, in no place, and in no manner' over the broadcast media." FCC Pet., App. A, p. 39a.

The court remanded the case to the Commission to "develop reasonable regulatory guidelines to deal with editorial advertisements" and to determine whether, in light of the regulatory guidelines developed, DNC would be entitled to purchase time to present the public issue announcements it was planning. FCC Pet., App. A, p. 44a.

ARGUMENT

In their efforts to persuade this Court to grant plenary review of the decision below, petitioners have shrouded the issues in this case in a fog of hyperbole and shrill rhetoric that obscures the limited and narrow impact of the court of appeals' ruling. Petitioners convey the impression that the court below has unjustifiably demolished the congressionally mandated scheme for regulating broadcasting and has undermined the entire foundation of public issue broadcasting in this country. It takes only a cursory reading of the decision below to lift that fog of hyperbole and shrill rhetoric and to realize that the extremely narrow ruling by the court of appeals does not warrant plenary review by this Court at this time.

The court below took special pains to emphasize the narrowness of its ruling because the same visions of Armageddon that characterize the petitions in this Court permeated the arguments made by the Commis-

sion and the broadcast networks in the court of appeals. Confronted by those forebodings of doom for the broadcast industry and predictions of an "administrative apocalypse"[6] for the Commission, the court below stressed:

> "The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut the 'heart' of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time." FCC Pet., App. A, p. 3a. (Emphasis in original.)
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> * * *
>
> "The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements." FCC Pet., App. A, p. 37a. (Emphasis in original.)

Consistent with those admonitions, the court below stated its narrow holding concisely and precisely: "We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." FCC Pet., App. A, p. 3a.

The relief granted by the court below was equally narrow. That court simply remanded the proceeding

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[6] FCC Pet., App. A, p. 40a.

to require the Commission to apply its administrative expertise and to "develop reasonable regulatory guidelines to deal with editorial advertisements"[7]—an exercise that the Commission studiously avoided in considering DNC's request for a declaratory ruling. The court even stopped short of deciding whether DNC was entitled to purchase broadcast time to present the public issue announcements it had planned. The court left that determination to be made by the Commission in light of the regulatory guidelines it developed. FCC Pet., App. A, p. 44a.

The sweeping attack now launched on that narrow ruling is based on nothing more than petitioners' speculative ruminations about the possible consequences of that ruling and their belief that workable regulatory guidelines will be impossible to devise. Petitioners' fears of hypothetical harm are an insufficient basis for plenary review by this Court at this time. This Court confronted similar arguments in the *Red Lion* case and responded: "[W]e will not now pass upon the constitutionality of [the challenged] regulations by envisioning the most extreme applications conceivable, . . . but will deal with those problems if and when they arise." 395 U.S. at 396. The Commission should be given an opportunity to develop regulatory guidelines governing editorial advertisements before this Court intercedes. In fact, the Commission had embarked on just such a course even before the court below issued its decision that is now under attack.[8]

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[7] FCC Pet., App. A, p. 44a.

[8] See *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, Docket No. 19260, 30 F.C.C.2d 26 (1971) [hereinafter cited as *Fairness Doctrine Inquiry*].

Two of the petitioners, Columbia Broadcasting System (CBS) and American Broadcasting Companies (ABC), also allege a conflict in the circuits as a basis for review in this Court. DNC will show that the supposed conflict does not exist.

I. Review by This Court at This Time Would Be Premature

In passing upon the constitutionality of the Commission's personal attack and political editorializing rules in the *Red Lion* case, this Court was confronted by broadcasters' contentions that those rules would inevitably result in self-censorship and a reduction or elimination of public interest programming. The Court dismissed those cries of alarm by noting that, "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider their constitutional implications." 395 U.S. at 393. That principle applies with even greater force in this case.

In rejecting the declaratory ruling requested by DNC, the Commission did little more than accept the predictions of dire consequences conjured up by the broadcasters. For example, the Commission agreed with the broadcasters that DNC's proposal could result in "a return to the chaotic situation of radio's early days" and in "the public's agenda for discussion of public issues . . . [being] set substantively and increasingly by the affluent." FCC Pet., App. B, p. 65a. At no time did the Commission draw upon its administrative expertise to examine whether those supposed consequences could be avoided by the devlopment of reasonable regulatory guidelines to govern editorial advertisements.

In effect, petitioners are asking this Court to grant plenary review only on the basis of their perception of the harm that might flow from the decision below before the Commission has applied its special expertise to seek to obviate that harm. In *Red Lion,* this Court declined to anticipate the possible constitutional consequences of rules already promulgated by the Commission solely on the basis of suppositions that harm might result from those rules. Here the Commission has not even undertaken to promulgate rules to accomodate the conflicting interests that have emerged from DNC's request for a declaratory ruling. In *Red Lion,* this Court made clear that it would not reach the merits of potential constitutional issues affecting broadcasting until the harm feared from Commission rules had matured into a reality through experience with those rules. It necessarily follows that review by this Court is premature when the Commission has not yet promulgated the rules that could make the broadcasters' fears even more illusory than they are at this stage of these proceedings.

The petition filed by the government in this case confirms that careful consideration by the Commission of the problems related to editorial advertisements could eliminate the hallucinatory concerns expressed by CBS and ABC in their petitions. The government notes that the Commission has undertaken a general inquiry into the fairness doctrine[9] and might well "reach a result similar to that ordered by the court of appeals." FCC Pet., p. 15. The government notes only that such a result would be reached "only after careful and thorough consideration of the evidence and opinions elicited in this inquiry," and it lists the various ramifications of

[9] *Fairness Doctrine Inquiry, supra,* note 8.

editorial advertisements that the Commission intends to explore in that inquiry. *Id.* Thus, the Commission has already set in motion the machinery for complying with the limited mandate of the court of appeals. By deferring any possible review of the questions presented by the decision below until the Commission completes its present inquiry, the Court will have the benefit of the evidence and opinions offered in that inquiry and the Commission's considered evaluation of that evidence and those opinions.

There is a certain irony in the government's decision to seek review in this Court after the Commission has initiated a rule-making proceeding to consider, *inter alia,* the very issue decided by the court below. That inquiry was begun before the court below issued its decision and at a time when the Commission's ruling on DNC's request for a declaratory ruling was the prevailing legal standard. In its Notice announcing that inquiry, the Commission referred specifically to its ruling on DNC's request but nevertheless solicited comments on "whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." *Fairness Doctrine Inquiry,* 30 F.C.C. 2d at 33. But, now that the court of appeals has agreed that question deserves further consideration, the Commission is seeking review of the issue of editorial advertisements in this Court and has simultaneously suspended its consideration of that question in the pending rule-making proceeding.[10]

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[10] See "Order Extending Time" in FCC Docket No. 19260 (*Fairness Doctrine Inquiry, supra,* note 8), released January 3, 1972. On the same day that the Commission released that Order, the government filed its petition with this Court seeking review of the court of appeals' decision.

At root, the court below has required the Commission to do nothing more than it had already decided to do. Yet the petitioners—and particularly CBS and ABC—foresee only disaster for broadcasting if the Commission is now permitted to pursue that course. Those cries of alarm can be explained only by petitioners' inability or refusal to comprehend the very narrow impact of the decision below.

Petitioners suggest, for example, that the court of appeals has stripped them of their journalistic supervision and control over public issue programming. See CBS Pet., p. 12; ABC Pet., p. 9. The court below, however, was careful to note that its decision had no such impact on broadcasters' normal programming responsibilities. It pointed out that it was dealing only with that portion of the broadcasting day—the portion allocated for paid advertisements—"in which *editorial* control over content has never been of major importance." FCC Pet., App. A, p. 38a. In other words, the court below dealt "only with time relinquished by broadcasters to others" and in which "broadcasters have no . . . strong First Amendment interest." *Id.* at pp. 19a-20a. Thus, even the broadest possibe reading of the decision below leaves untouched the very interest of broadcasters that petitioners suggest has been jeopardized.

Petitioners further contend that any requirement that broadcasters carry some editorial advertisements will necessarily conflict with their fairness doctrine obligations [11] and give the wealthy a more powerful voice on the broadcast media.[12] The court of appeals

[11] See ABC Pet., pp. 10-11.

[12] CBS Pet., pp. 14-15; ABC Pet., pp. 11-12.

acknowledged that such problems might arise from its invalidation of the flat ban on editorial advertisements. But it did not view the mere existence of those problems as a sufficient justification for perpetuating that ban. Rather, it viewed those problems as peculiarly susceptible to resolution through the Commission's administrative processes, and it specifically suggested that the Commission address those problems under the court's mandate. FCC Pet., App. A, pp. 40a-42a. Petitioners, however, urge the mere existence of such problems as a sufficient reason for interdicting this proceeding in this Court before the Commission has an opportunity to develop reasonable regulatory guidelines.

CBS argues that a necessary consequence of the decision below will be to fill the airwaves with paid announcements on "stale," "insignificant" and "trivial" issues. CBS Pet., p. 15. It is somewhat surprising to find such an argument made by those who preside over a medium that was described a decade ago as a "vast wasteland" [13] and that, if anything, has become more barren of substance and quality since. For example, a recent profile of the CBS executive responsible for programming decisions summarized his philosophy as a preference for "not programs that he thinks people will necessarily *like*, or *benefit* from, or be *enriched* by, but programs he thinks people will watch." [14] That

[13] That description of the desolate nature of television programming was first used by Newton Minnow, then Chairman of the Federal Communications Commission, in an address to the 39th Annual Convention of the National Association of Broadcasters in Washington, D. C., on May 9, 1961. That address is reprinted in N. Minnow, *Equal Time* 47 (1964).

[14] T. Thompson, *The Crapshoot for Half a Billion*, Life Magazine, Sept. 10, 1971, p. 47. (Emphasis in original.)

same network now suggests to this Court that editorial advertisements will somehow demean the quality of television programming, necessarily sweeping within its pejoratives the paid announcements planned by DNC —announcements designed to discuss current issues affecting the conduct of our government and to acquit the Democratic Party's responsibilities as one of the two major political parties in our democratic system.

This CBS argument betrays the real interest of the broadcasters in pursuing this proceeding in this Court. Bluntly stated, the broadcasters seek to preserve the monopoly they presently enjoy in deciding what public issues the American people should be exposed to through the electronic media. The court below has simply ruled that other groups in society should, to some degree, share that awesome responsibility with the few who are privileged to control the limited number of broadcast licenses available and the handful of corporate executives who control the three networks in this nation. It is understandable that broadcasters would find such a result disquieting. But the court below was concerned with core First Amendment values and not with broadcasters' sensibilities.

CBS and ABC also assert that the decision below is in conflict with this Court's decision in *Red Lion*. See CBS Pet., pp. 12-13; ABC Pet., pp. 8-9. That argument will not withstand analysis. The *Red Lion* decision was the constitutional touchstone for the court of appeals' decision. That court, however, did not view *Red Lion* as placing inflexible parameters on the First Amendment interests at work in broadcasting. *Red Lion* dealt only with the interplay between the First Amendment and the fairness doctrine as they relate to a broadcaster's statutorily imposed public interest obli-

gations. But the fairness doctrine does not define the totality of those public interest obligations. As the court below observed, "the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, *complementary* airing of controversial views during advertising time." FCC Pet., App. A, p. 28a. (Emphasis added.) Thus, rather than being at odds with *Red Lion,* the decision below is, if anything, an obvious and constitutional implementation of that seminal ruling in the context of editorial advertisements.

The central argument made in this Court by the government differs substantially in tone and import from the arguments made by CBS and ABC. In essence, the government argues that, by basing its decision on constitutional grounds, the court below has shifted the prime responsibility for "the making of the basic policy judgment [relating to editorial advertisements] from the Commission to the courts, and, in so doing, sets a new and significant course for broadcasting." FCC Pet., p. 10. The government thus seems to be suggesting that the court of appeals has improperly usurped a function committed solely to the Commission's unbridled discretion. That argument misses the mark.

The court below was fully aware the maintenance of a viable regulatory scheme for broadcasting required that it tread cautiously "when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements" of the Communications Act. FCC Pet., App. A, p. 9a. Courts are traditionally reluctant to intercede in matters that require an administrative agency to exercise its special expertise. But the issues in this proceeding trans-

cended matters within the Commission's peculiar technical competence. The declaratory ruling sought by DNC drew into question the obligations imposed on broadcasters by the First Amendment. Courts—and not administrative agencies—are the appropriate arbiters of constitutional disputes.

In response to an analogous argument made in *Red Lion,* this Court admonished that "Congress need not stand idly by and permit those with [broadcast] licenses to ignore the problems that beset the people or to exclude from the airways anything but their own views of fundamental questions." 395 U.S. at 394. Similarly, the courts need not hold the Constitution in abeyance while the Commission endorses actions by broadcasters that jeopardize or deny the effective exercise of First Amendment rights.

For these several reasons, petitioners have stated no substantial reason to justify review of the decision below by this Court at this time. Rather, as DNC has shown, review by this Court at this time would be premature.

II. There Is No Conflict in the Circuits

CBS and ABC assert as an additional ground for review by this Court the claim that the decision below is in direct conflict with decisions by courts of appeals in two other circuits.[15] Those two petitioners purport to find different bases for the supposed conflict, but their arguments are equally without merit.

ABC contends that the holding by the court below that the actions by broadcasters constitute state action

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[15] The government's petition does not claim that review is necessary because of a conflict in the circuits.

and are thus subject to the restraints of the First Amendment conflicts with contrary rulings in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950), and *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). In both cases, the courts of appeals rejected claims of a right of access growing out of contractual commitments but framed in constitutional terms on the ground that a broadcaster's actions are private in nature and are thus unrestrained by constitutional guarantees. The court below refused to follow those decisions, observing that they reflected "a crabbed judicial view of 'state action.'" FCC Pet., App. A, p. 11a.

In its state action ruling, the court below was simply applying constitutional principles evolved in decisions by this Court—decisions that have rendered obsolete the restrictive view of state action expressed in the *Massachusetts Universalist Convention* and *McIntire* cases. Only two years after the *Massachusetts Universalist Convention* case was decided, this Court held that, when a federal agency licenses a private organization to provide services to the public and when that agency exercises continuing and pervasive supervision to assure compliance with statutory requirements, the First Amendment applies with equal force to the licensee and the agency. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). Subsequent decisions by this Court have abandoned the rigid and formalistic classification of behavior as "private" and "state" and have examined instead the realities of interaction between government and private groups to determine whether constitutional restrictions are applicable. See, *e.g.*, *Amalgamated Food Employees Union* v. *Logan*

Valley Plaza. Inc., 391 U.S. 308 (1968); *Evans* v. *Newton,* 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). "Conduct that is formally 'private' may become so intertwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton, supra,* 382 U.S. at 299.

One would have to blink at reality to conclude that broadcasting in this country is not "intertwined with governmental policies." Virtually all aspects of a broadcaster's operations are subject to the Commission's control and supervision. Indeed, the ban on editorial advertisements at issue in this case could not exist without the Commission's consent and approval. If any conflict exists on the state action question, it is between the decisions of the First and Third Circuits cited by ABC and the decisions of this Court.

CBS alleges that the conflict exists only with respect to the Third Circuit's decision in *McIntire* and only with respect to the Third Circuit's observations on the First Amendment issues implicit in the question of the right of access to the broadcast media. CBS claims that the Third Circuit's opinion constitutes "a square rejection of the First Amendment claim" of any such right of access. CBS Pet., p. 18. However, in light of the Third Circuit's state action ruling in *McIntire,* its comments on the First Amendment issue were nothing but dicta. A supposed conflict between dicta in one circuit and a holding on an issue of law in another circuit does not require resolution by this Court.

CBS contends, however, that the *McIntire* dicta was subsequently adopted and applied by the Third Circuit to a First Amendment claim of access in *Avins* v.

Rutgers, 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968). The *Avins* decision dealt only with an author's claim that his article was improperly rejected for publication in a law review. But in considering only access to the print media, *Avins* neither addressed nor reached the markedly different First Amendment considerations involved in access to the broadcast media. In fact, *Avins* predates this Court's decision in *Red Lion,* which represents the first effort to sketch the contours of the First Amendment values at work in broadcasting. It is extremely doubtful that even the Third Circuit would agree that its simplistic view of the First Amendment's relevance in broadcasting, first expressed 27 years ago in *McIntire,* has survived the *Red Lion* decision. Consequently, any arguable conflict between the *McIntire-Avins* decisions and the decision below is more apparent than real. It is certainly not a conflict that requires resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 2, 1972